No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES
Petitioner,

v.

CASPER WEINBERGER AS SECRETARY OF THE DEPARTMENT OF DEFENSE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Russell D. Hall
Assistant General Counsel
Department of Human Services
P. O. Box 25352
Oklahoma City, OK 73125
(405) 521-3508

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QUESTIONS PRESENTED

The question presented is one of conflicting interpretations of a Federal statute.

Specifically, whether or not the Department of Defense regulation at 32 CFR §260.3(i)(3)(i) is inconsistent with the statute at 20 U.S.C. §107d-3(d).

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner State of Oklahoma, ex rel. Department of Human Services, herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is unreported and appears in the Appendix. The judgment of the Western District of Oklahoma, U.S. District Court, appears in the Appendix.

Jurisdiction

The judgement of the Tenth Circuit Court of Appeals (Appendix) was entered on October 19, 1983. A timely petition for rehearing was denied on November 22, 1983 (Appendix). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

The following are three versions that are discussed:

The statute states at 20 U.S.C. §1078-3(d),

"Subsections (a) and (b)1 of this section shall not only apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, United States Code, or to income from vending machines operated by the Veterans Canteen Service..."

The Department of Education regulations provide at 34 C.F.R. §395.32(i),

"The provisions of this section shall not apply to income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems authorized under Title 10 of the United States Code; to income from vending machines operated by the Veterans' Canteen Service;..."

Compared to the D.O.D. version, 32 C.F.R. §260.3(i(3)(i)

."(i) Income from vending machines operated by or for the military exchanges or ships' stores systems; or"

Statement of the Case

In September, 1978, the Department of Human Services issued letters requesting distribution of vending machine income to Vance Air Force Base, Altus Air Force Base, Port Sill Army Base, and Tinker Air Force Base. In each case, the claim was denied for vending machine income produced by AAFES (Army-Air Force Exchange System) vending machines operated anywhere regardless of location. In May, 1980, the Department of Human Services filed a request for arbitration with the Department of Education. Because of the reorganization of HEW, the new D.O.E. was in chaos from which it has never recovered. Despairing of any

administrative resolution after waiting a year, a complaint was filed with the trial court in July, 1981, seeking declaratory and injunctive relief. The D.O.D. responded with a Motion for Summary Judgment and Motion to Dismiss in September, 1981. In October, 1981, the Department of Human Services filed its Motion for Summary Judgment and Response to the Motion to Dismiss. The D.O.D. requested and received four extensions of time for various reasons. In December, 1981, the Court sustained the Motion to Dismiss, finding that the request for past vending machine income would have to be brought in the Court of Claims. In February, 1982, the D.O.D. filed its response to the State's Motion for Summary Judgement. The Court issued its Order in December, 1982 granting the D.O.D.'s Summary Judgment and denying the State's Motion for

Summary Judgment. From this Order, the State filed a Motion to overrule which was stricken. The State then filed an appeal with the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals affirmed the District Court's decision on October 19, 1983. A petition for rehearing was denied on November 22, 1983.

Reasons for Granting Writ

This issue affects several thousand blind people, the governments of fifty states, and the Department of Defense, and millions of dollars. The public importance is sufficient cause to hear the case.

Secondly, the Court's intervention is necessary to reverse decisions by the District Court and Appeals Court that directly conflict with the specific wording of a Federal statute, 20 U.S.C. §107d-3(d). The law limits an exemption to income from

vending machines "within a retail sales outlet", yet the lower Courts simply write this phrase out by exempting vending machines regardless of location. It is one thing for the Court to interpret the law, but quite another to rewrite the law.

The Appellate Court found a decision of the Department of Justice to be noteworthy in its support of the D.O.D. position. The Appellate Court did not have, nor had it read, the decision of the Department of Justice, since it was not a part of the record. It was inappropriate to rely on a conclusion without reviewing the rationale. The only reference that such a decision even existed was to an unsworn statement by D.O.D. counsel in one of its briefs. Attempts by this counsel to obtain a copy of the decision by means of the F.O.I.A. were unsuccessful. The Appellate Court failed

to find noteworthy the opinions of Oklahoma's attorney, Texas' attorney, Texas Arbitration Panel, counsel for the Department of Education, and counsel for the General Accounting Office which were a part of the record and available for reading that found the law means what it says. Further the Appellate Court found that the D.O.J. was in a "neutral position" when it found in favor of the D.O.D. The D.O.J. is responsible for representing Federal agencies in litigation. The D.O.D. was involved in the present lawsuit when the D.O.J. considered the matter. The D.O.J. would be no more neutral to its client than this attorney would be to his client. Further, the law places the interpretation and administration of the Randolph/Sheppard Act with the D.O.E. not the D.O.J. If Congress had trusted the

D.O.J. to handle disputes it would not have created arbitration panels.

The Appellate Court found that Congressional intent is inconsistent with the clear wording of the statute. This conclusion is improper since the wording of the statute is the best source of Congressional intent. Further, Senator Randolph's comments are consistent with the State's position. The Brademas-Sykes colloquy often cited is full of inaccurate statements and is of less persuasive authority than Senator Randolph's statements whose name is part of the Act and who has been involved with the Act since 1936. The Appellate Court underlined for emphasis a reference to the statement that the exemptions shall not apply to the military services. Even the D.O.D. concedes that non-appropriated fund activities of the military are subject to

the income-sharing requirements except for the exchanges. The colloquy also states a reference to page 24 of Senate Report 93-937 which in turn states that the exchange services operate with specific authority. Neither the State nor D.O.D. contends that the D.O.D. has specific statutory authority to operate the exchange activities. Further, the colloquy would include "officer and enlisted messes, and so forth", which even the D.O.D. concedes is not part of the exemption.

The Appellate Court erred in finding that following the law as written would result in an unjust result. The D.O.D. has testified that income-sharing would not have a significant impact on their activities, after all the other numerous Federal agencies are subject to it. The Appellate Court did not even mention the unjust result

that will occur to the blind vendors based on the D.O.D. interpretation. Income-sharing can be used as a defense by blind vendors to unfair competition. Normally, when vending machines operate in direct competition with a blind stand the entire profit is assigned to the blind to discourage this practice. The exemption provided the D.O.D. allows it to directly compete with blind stands. In a price war, the lone blind operator will not be able to compete with the multi-billion dollar AAFES.

The Appellate Court did concede the law does read consistently with the State's interpretation. It is requested that this Court apply the law as passed by Congress

and interpreted by the implementing agency, D.O.E.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Oklahoma City, Oklahoma

January 20, 1984

Respectfully submitted,

Russell Hall

Russell D. Hall
Attorney for Petitioner
P. O. Box 25352
Oklahoma City, OK 73125
(405) 521-3508

CERTIFICATE OF SERVICE

This is to certify that as a member of the Bar of the U.S. Supreme Court, this attorney of the Petitioner served three (3) copies of the Petition for Writ of Certiorari by certified mail with postage prepaid on the attorneys for the Department of Defense:

Mr. Charles Symonds
Office of General Counsel
Army and Air Force Exchange
Service
P. O. Box 22305
Dallas, TX 75222

Mr. Bernard Marcak
U. S. Air Force
AFMPC/JA,
Randolph AFB, TX 78150

Mr. William S. Price
U. S. Attorney,
Mr. Roger Griffith, Assistant,
4434 U. S. Courthouse
200 N.W. 4th Street
Oklahoma City, OK 73102

All parties to be served have been served.

Russell D. Hall
Assistant General Counsel
Department of Human Services
P. O. Box 25352
Oklahoma City, OK 73125

UNITED STATES COURT of APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse TELEPHONE
Denver, Colorado 80294 (303)837-3157
Howard K. Phillips October 19, 1983 (FTS)327-3157
Clerk

Mr. Russell D. Hall
Department of Human Services
P.O. Box 25352
Oklahoma City, OK 73125

Mr. Charles G. Symonds
Office of General Counsel
Army and Air Force
Exchange Service
P.O. Box 22305
Dallas, TX 75222

Re: No. 83-1258: State of Oklahoma vs.
Weinberger (D.C. #81-928-T)

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

HOWARD K. PHILLIPS, CLERK

By:/s/Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

RLK:kmh
cc: Honorable Ralph G. Thompson
Mr. Bernard Marcak, U.S. Air Force, AFMPC/JA,
Randolph AFB, TX 78150
Mr. William S. Price, U.S. Attorney,
Mr. Roger Griffith, Assistant, 200 N.W. 4th Street,
Oklahoma City, OK 73102

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STATE OF OKLAHOMA, ex rel. Department of Human Services, Plaintiff-Appellant,	)	
v.	)	No. 83-1258
CASPER WEINBERGER, as Secretary of the United States Department of Defense, Defendant-Appellee.	)	

On Appeal from the United States District Court

For the Western District of Oklahoma

Submitted on the briefs:

Russell D. Hall, Assistant General Counsel, Legal Division, Department of Human Services, Oklahoma City, Oklahoma, Attorney for Plaintiff-Appellant.

William S. Price, United States Attorney, and Roger Griffith, Assistant United States Attorney, Oklahoma City, Oklahoma; Bernard Marcak, Department of the Air Force, Randolph AFB, Texas; and Charles G. Symmonds, Associate General Counsel, Army and Air Force Exchange Service, Dallas, Texas, Attorneys for Defendant-Appellee

Before BARRETT, DOYLE and McKAY, Circuit Judges

BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The Department of Human Services of the State of Oklahoma (DHS) appeals from a memorandum opinion and order granting summary judgment in favor of Casper Weinberger, as Secretary of the United States Department of Defense (DOD). The single issue presented to the district court and raised on appeal is whether the statutory exemption from vending machine income sharing under the Randolph-Sheppard Act (Act), 20 U.S.C.A. §§107-107f, applies to all machines of the military exchanges or only to those machines physically located inside an exchange store.

At the outset, we note that summary judgment is proper when, as here, neither party contends that a

genuine issue exists as to any material fact and none is present. Ruhs v. Pacific Power & Light, 671 F.2d 1268 (10th Cir. 1982). Similarly, the questions of statutory construction and legislative history raised herein present legal questions of statutory construction and legislative history properly resolved by summary judgment. Union Pacific Land Resources Corporation v. Moench Investment Company, Ltd., 696 F.2d 88 (10th Cir. 1982), cert.denied, _____ U.S. _____ _____.

A brief review of the uncontested facts is in order. Under the Act as enacted in 1936, blind persons were authorized to operate the vending facilities on federal property. As a result of limited growth within the blind vendor program, precipitated in part by the escalating use of automatic vending machines, the Act was amended in 1974. The amendments, in addition to affording blind persons a priority in the operation of vending facilities, also provided that income from vending machines on federal property be shared in specified percentages with blind vendors or state blind

vendor licensing agencies similar to DHS. The amendments did provide, however, that income from certain vending machines was to be exempt from the income sharing requirements.

Specifically, 20 U.S.C.A. §107d-3(d) provided:

Income from vending machines in certain areas excepted

(d) Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ship's stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3000 annually.

The Department of Health, Education and Welfare (HEW) (now the Department of Education), as the principal agency designated for carrying out the Act's

provisions, issued a regulation, 45 C.F.R. §1369.32(i), interpreting the income sharing exception as applying to "income from vending machines within operated retail outlets under the control of post exchange or ships store systems . . . ." DOD, in issuing its regulation 32 C.F.R. §260.3(i)(3)(i), interpreted the income sharing exception as not applying to "Income from vending machines operated by or for the military exchange or ships' stores systems."

DHS initiated the action herein after DOD refused DHS's request for distribution of vending machine income from Vance Air Force Base, Altus Air Force Base, Fort Sill Army Base and Tinker Air Force Base, all DOD installations located in Oklahoma. Within its action, DHS sought a declaration that the DOD regulation was void, an injunction against its continued enforcement, a writ of mandamus compelling the Secretary of Defense to replace the contested regulation, an accounting of vending machine income due, and an order that DOD pay all future income sharing revenue as it accrues.

After reviewing the authorities, briefs, numerous exhibits and documentary evidence submitted by the parties, the district court concluded that the DOD regulation was not contrary to the income sharing exception set forth in 20 U.S.C.A. §107 d-3 (d) "and therefore the motion of the defendant [DOD] should be granted." [R. Vol. I at p. 151]. In so doing, the court accepted DOD's agrument that the exception was ambiguous as evidenced by HEW's differing interpretations in its initial "draft regulation for a broad exception of income from vending machines under the control of post exchange or ships' stores systems . . . to the final regulation -- that simply exempts income from vending machines within operated retail sales outlets under the control of post exchange or ships' stores systems." [R. Vol. I at p.152].

As set forth, supra, the sole issue on appeal is whether the court properly concluded that the exemption from vending machine income sharing under the Act applies to all machines of the military exchanges, as found by the district court, or only to those machines physically located inside an exchange store.

We hold that the district court properly concluded that the regulation promulgated by DOD interpreting the income sharing exception as not applying to vending machines operated by or for the military exchanges or ships' stores systems was not contrary to 20 U.S.C.A. §107 d-3(d) and that DOD was entitled to summary judgment.

We agree with DHS that a literal reading of the exception limits the exception from revenue sharing only to "vending machines within retail sales outlets under the control of exchange or ships' store systems." However, as noted by the district court, citing to Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), a court may adopt a resricted meaning of the statutory words where the literal or unusual meaning of the words would lead to absurd results or thwart the obvious purpose of the statute. Such is the case at hand.

DHS' proposed interpretation that the exception applies only to machines within exchanges or stores would effectively deprive DOD of all exceptions when, as here, it is uncontested that: a typical military base is located on substantial areage; a typical base has numerous buildings for administration, command,

schools, barracks, operations, and recreation, all of which will or are likely to have vending machines located inside the building and in outdoor patios as well; very few military exchanges vending machines are actually physically located inside an exchange; and a 1978 survey established that only 580 (1.3%) of the 43,952 Army and Air Force Exchange Service vending machines were located inside a retail store.

DHS's proposed exception interpretation is also contrary to the intent of Congress. As the district court noted:

> The most persuasive evidence of Congressional intent is found in the following colloquoy between Congressmen Brademas and Sikes during house floor debate on the amendments:
>
> "Mr. SIKES. Mr. Speaker, first let me congratulate my distinguished friend, the gentleman from Indiana (Mr. Brademas), and his committee for an important legislative accomplishment. This is a good bill and a needed bill.

Mr. Speaker, I do seek clarification on one point. I have discussed this with the distinguished gentleman, and let me ask a question.

In Section 7(d) of the amended act (section 206 of H.R. 14225), there is a statement that the income-sharing provisions as they pertain to vending machines 'within the retail sales outlets under the control of exchange or ship's store's systems authorized by title 10,' shall not apply.

I would presume, and I would like the distinguished subcommittee chairman to verify for the record, tht this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchange. Navy exchanges, officer and enlisted messes, and so forth.

As you are aware, the profits from these vending machines are utilized by the

services to finance such worthwhile endeavors as the base libraries, the youth activities, hobby shops, and motion picture programs, ashore and afloat. The servicemen finance these programs themselves through the revenues collected in the retail sales outlet systems as I have mentioned. To require that these revenues be shared might will necessitate the appropriation of additional funds for the defense budget. Since work in the fiscal year 1975 defense appropriations bill has been completed, the effect would be to cut off these needed programs without support.

Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of Senate report (S. Rep. No. 93-937) which is more specific on this issue that[n] is the conference report?

> Mr. BRADEMAS. Mr. Speaker, I thank the gentleman from Florida for his fine remarks about this legislation. I am pleased to tell the gentleman that the answer to both his questions is 'Yes.'" Congressional Record -House, October 16, 1974, H10604. (Emphasis added).

[R. Vol. I at pp. 154-155].

Finally, we believe it noteworthy to observe that the position adopted by the DOD was also endorsed by the Department of Justice (DOJ) while functioning in a neutral position. In 1981, after DHS and DOD had both filed for summary judgment, the Department of Education, as successor to HEW and the designated principal for carrying out the Act, formally referred the exception to DOJ for resolution of an interagency legal dispute. DOJ rejected the literal, narrow approach of the Department of Education and DHS and instead, concluded that the DOD position was correct and consistent with the Act's legislative history.

AFFIRMED.

UNITED STATES COURT of APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse TELEPHONE
Denver, Colorado 80294 (303)837-3157
Howard K. Phillips November 22, 1983 (FTS)327-3157
Clerk

Mr. Russell D. Hall
Department of Human Services
P.O. Box 25352
Oklahoma City, OK 73125

Re: No. 83-1258: State of Oklahoma vs. Weinberger etc.

Dear Mr. Hall:

Enclosed is a copy of the order entered today in the captioned cause.
opinion has been entered today.

Very truly yours,

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, CLERK

HKP:oac

Enclosure

cc: Mr. Charles G. Symmonds, Office of the General Counsel, Army & Air Force Exchange Service, P.O. Box 22305, Dallas, TX 75222
Bernard Marcak, U.S. Air Force, AFMPC/JA, Randolph AFB, TX 78150
Mr. William S. Price, U.S. Attorney,
Mr. Roger Griffith, Assistant, 200 N.W. 4th Street, Oklahoma City, OK 73102

NOVEMBER TERM - November 22, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges;

STATE OF OKLAHOMA, ex rel. Department of Human Services Plaintiff-Appellant, vs. CASPER WEINBERGER, as Secretary of the United States Department of Defense Defendant-Appellee.	)	No. 83-1258

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., Department of Human Services,	)	
Plaintiff,	)	
vs.	)	NO. CIV-81-928-T
CASPER WEINBERGER, as Secretary of the United States Department of Defense,	)	
Defendant.	)	

JUDGMENT

In accordance with the Court's Order entered this date, judgment is hereby entered in favor of defendant Casper Weinberger, as Secretary of the United States Department of Defense and against plaintiff State of Oklahoma, ex rel., Department of Human Services.

DATED this 21st day of December, 1982.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., Department of Human Services, Plaintiff,	)
vs.	)NO. CIV-81-928-T
CASPER WEINBERGER, as Secretary of the United States Department of Defense, Defendant	)

MEMORANDUM OPINION

The Randolph-Sheppard Act, 20 U.S.C. §§107-107-f, authorizes the operation of vending facilities on any federal property by blind persons. The act, which was amended in 1954 and 1974, has the purposes of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). Dissatisfaction with the limited expansion of the blind vendor program since its 1936 enactment, that stemmed at least partially from the competition of automatic vending machines and opposition of employees and officials to the blind vendor program, resulted in the enactment of the 1974 amendments. This legislation designates the Department of Health, Education and

Welfare[1] (HEW) (now the Department of Education) as the principal agency for carrying out the act's provisions and authorizes the Secretary of HEW to issue implementing rules and regulations. The amendments give licensed blind persons a priority in the operation of vending facilities and provide that income from vending machines on federal property be shared in specified percentages with blind vendors or state blind vendor licensing agencies, depending on the degree the machines compete with the blind vendors. Certain vending machines are however, excepted by 20 U.S.C. §107d-3(d) from the income-sharing requirements. This exception forms the basis of this suit, brought by the Department of Human Services of the State of Oklahoma, the state licensing agency designated by HEW to

---

1/ The Department will be referred to by its original title for purposes of this order.

implement the Randolph-Sheppard Act in Oklahoma against the Secretary of Defense.2/.

The disputed exception provides:

> "Income from vending machines in certain locations excepted
> (d) Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' store systems authorized by Title 10, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually. (Emphasis added).

2/ The Randolph-Sheppard Act provides for arbitration of a state licensing agency's complaint regarding a federal department or agency's failure to comply with the provisions of the ct or any regulations issued pursuant to it. Plaintiff filed an arbitration complaint more than a year ago with the Department of Education but has not obtained a decision and does not anticipate one will be rendered due to the recalcitrance of the Department of Defense. The defendant has not objected to the Court's consideration of this issue and accordingly, under these circumstances, plaintiff will not be required to exhaust its administrative remedies.

HEW, the General Accounting Office and the plaintiff interpret this exception as only excluding income from military exchange-operated vending machines physically located within a retail exchange store. 3/ The Department of Defense (DoD) has taken the position and issued a regulation, 32 C.F.R. §260.3 (i)(3)(i), specifying that section 107d-3(d) excludes all income from vending machines under the control of military exchanges or a part of the exchanges' retail outlet system, regardless of their location, from the income-sharing requirements of the Randolph-Sheppard Act. Based on this regulation, DoD installations in Oklahoma have refused to make income-sharing payments to the plaintiff, resulting in the institution of this

3/ See 45 C.F.R. §1369.32(i)

of this action to obtain a declaration that the DoD regulation is void, an injunction against its continued enforcement and a writ of mandamus compelling the Secretary of Defense to replace the contested regulation, prepare an accounting of vending machine income due, and pay future income as it accrues.

Both plaintiff and defendant have filed Motions for Summary Judgment. Neither party contends that a genuine issue as to any material fact exists and as none is present, summary judgment is appropriate. Fed.R.Civ.P. 56, Mustang Fuel Corp. v. Youngstown Sheet & Tube, 561 F.2d 202 (10th Cir. 1977). The Court concludes, having reviewed the authorities relied upon by the parties, the briefs, and the numerous exhibits and documentary evidence submitted, that the regulation issued by the defendant is not contrary to the exception, 20 U.S.C. §107d-3(d), and therefore the motion of the defendant should be granted. The reasons for the decision follow a brief summation of the parties contentions.

The arguments advanced by the plaintiff in support of its motion for summary judgment may be briefly stated as, the defendant's regulation is contrary to the plain meaning of the exemption and the regulation of HEW, which is authorized to promulgate regulations and administer the Act on a federal level, should be accorded deference and govern. In support of its regulation DoD contends that the language of the exemption is unclear and that its interpretation not only is the most reasonable, but reflects Congressional intent and effectuates the exemption's purpose.

The Supreme Court has stated that the "starting point in every case involving construction of a statute is the language itself". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). Following the literal meaning of the words would,in this case, compel concurrence with the plaintiff's position as "vending machines within retail sales outlets" would appear to refer to machines within an exchange store. However, when interpreting the words of a statute a court has

"some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results...or would thwart the ovious purpose of the statute..." Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

Rejection of the "plain meaning" of the exemption is required because the literal words conflict rather than comport with the prupose of the statute and are inconsistent with evidence congressional intent. Furthermore, as argued by the defendant, varying HEW interpretations of the exemption that evolved during the consultations the department conducted with DoD prior to publishing its regulations indicate that, contrary to plaintiff's assertions, the statutory language is not without some ambiguity. The differing interpretations are documented by defendant's Exhibit IV and reflect a change in HEW's position from specifically providing in an initial draft regulation for a broad exemption of income from vending machines under the control of post exchange or ships' stores systems.

Another indication that the language is imprecise is reflected in HEW's addition of the terms "operated" and "post" to the statutory language in its regulation. Assuming ambiguity exists, these additions and HEW's final interpretation normally would control because when a statute is ambiguous deference is afforded to a reasonable interpretation given it by the agency charged with its administration. Rocky Mountain Oil and Gas Association v. Watt, Nos. 81-1040, 81-1041 (10th Cir. Nov. 30, 1982). However, the conflict between HEW's interpretation and the statute's legislative history precludes adopting that administrative agency's position.

One of Congress' purposes in enacting the legislation was to remedy the diversion of what should have been blind income from vending machines to (nonmilitary) employee recreation and welfare groups. The Comptroller General had, since 1949, objected to the retention of profits from resale operations by employee associations on the ground that the funds were

required to be deposited in the United States Treasury. Defendant's Exhibit VIII, Comptroller General's Report to Congress, August 10, 1949; defendant's Exhibit IX, a 1952 decision of the Comptroller General that the use of proceeds received from vending machines in FBI offices by employees for recreational and other purposes was improper and the funds received were required to be deposited into the Treasury as miscellaneous receipts; defendant's Exhibit X, a similar decision issued in 1952 regarding proceeds received from vending machines in post offices.4/ However, in his 1949 report to Congress the Comptroller General recognized that past exchange profits were not required to be deposited to the credit of the United States but could be used for the welfare of military personnel. Various Congressional references to and

---

4/The Comptroller General stated in this decision that it would interpose no objection to the continued use of proceeds derived by employee groups for employee general welfare activities pending action by Congress clarifying the proper use of the funds as recommended in his August, 1949 report to Congress.

discussions of the 1949 Report and the two Comptroller General decisions regarding vending machine income (e.g. defendant's Exhibits VII and XI) that occurred during hearings and in reports regarding the amendments substantiate the conclusion that Congress intended by the legislation to promote the blind vendor program by affecting he retention of vending machine income by nonmilitary employee groups, such as the postal workers union.

Other indications of Congressional intent[5/] are found in Senate Report 93-937, defendant's Exhibit XV, one of several that accompanied the Randolph-Sheppard Act Amendment of 1974. The report states that substantive amendments were made in the Senate Bill (that was proposed to amend the Randolph-Sheppard Act for the Blind), which included:

5/ See also post-passage correspondence between HEW Secretary David Mathews and Congressman Sikes and between Congressman Brademas and Congressman Sikes. Defendant's Exhibits XVII and XVIII.

"8. Substituted a new section 7 of the Act which ... excludes certain activities and installations from application of the section;" p.2

"Subsection (d) provides that the assignment of income provisions of subsections (a) and (b)(1) do not apply to vending machine income from military exchange retail outlets..." p.21

"Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded..." p.24

The most persuasive evidence of Congressional intent is found in the following colloquoy between Congressman Brademas and Sikes during house floor debate on the amendments:

"Mr. SIKES. Mr. Speaker, first let me congratulate my distinguished friend, the gentleman from Indiana (Mr. Brademas), and his committee for an important legislative accomplishment. This is a good bill and a needed bill.

Mr. Speaker, I do seek clarification on one point. I have discussed this with the distinguished gentleman, and let me ask a question.

"In section 7(d) of the amended act, (section 206 of H.R. 14225), there is a statment that the income-sharing provisions as they pertain to vending machines 'within the retail sales outlets under the control of exchange or ship's store's systems authorized by title 10' shall not apply. I would presume, and I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.

As you are aware, the profits from these vending machines are utilized by the services to finance such worthwhile endeavors as the base libraries, the youth activities, the gymnasium, and other sports activities, hobby shops and motion picture programs, ashore and afloat. The servicemen finance these programs themselves through the revenues collected in the retail sales outlet systems as I have mentioned. To require that these revenues be shared might well necessitate the appropriation of additional funds for the defense budget. Since work in the fiscal year 1975 defense appropriation bill would be to cut off these needed programs without support.

> Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the language on page 24 of the Senate report (S.Rep. No. 93-937) which is more specific on this issued that (n) is the conference report?
>
> Mr. BRADEMAS. Mr. Speaker, I thank the gentleman from Florida for his fine remarks about this legislation. I am pleased to tell the gentleman that the answer to both his questions is 'Yes.'"
>
> Congressional Record -House, October 16, 1974, H 10604. (Emphasis added).

The discussion establishes that the interpretation given the exception by the defendant and adopted by the Court, which exempts income from all vending machines that are a part of the retail outlet system under the control of the military exchanges, is in accord with Congressional intent. This interpretation also effects the evident purpose of the exception -- to provide continued support for the military exchanges. To adopt plaintiff's interpretation would render the exemption meaningless because the few machines that are physically located within the exchange retail stores generate only insignificant income and thus would normally be covered by the general $3,000 exemption.

In summation, the Court concludes that the regulation of the Department of Defense is consistent with the statutory language, the purpose of the exception, and Congressional intent and thus is not void. Accordingly, defendant's Motion for Summary Judgment shall be and is hereby granted and plaintiff's Motion for Summary Judgment shall be and is hereby denied.

IT IS SO ORDERED this 21st day of December, 1982.

/s/
UNITED STATES DISTRICT JUDGE

No. 83-1311

In the Supreme Court of the United States

OCTOBER TERM, 1983

DEPARTMENT OF HUMAN SERVICES, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision of the court of appeals that the Department of Defense (DOD) is not required under the Randolph-Sheppard Vending Stand Act (Randolph-Sheppard Act), 20 U.S.C. 107 *et seq.*, to share income from vending machines operated by military exchanges with state agencies that license blind people to operate vending facilities on federal properties.

1. In 1936, in order to provide employment for the blind, Congress passed the Randolph-Sheppard Act, which provides that blind persons may operate vending facilities on federal properties. 20 U.S.C. 107(a). To implement this program, the Secretary of Health, Education, and Welfare[1]

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[1]Prior to 1979, the Secretary of Health, Education and Welfare administered the Randolph-Sheppard Act. In 1979, those functions were transferred to the Secretary of Education. Pub. L. No. 96-88, §§ 301(a)(4)(B) and 507, 93 Stat. 678, 692.

was authorized to designate a state agency to license blind individuals to operate vending facilities at various federal properties within the state. 20 U.S.C. 107a(b).

Because many federal buildings had both blind vendors and vending machines, which compete for business, Congress in 1974 amended the Randolph-Sheppard Act to provide that certain income from vending facilities and machines on federal property should be shared with the state agency that provides for the welfare of blind persons. Pub. L. No. 93-651, § 206, 89 Stat. 2-12, (20 U.S.C. 107d-3(b)). Congress, however, exempted from the Act's coverage "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by title 10." 20 U.S.C. 107d-3(d). By regulation, DOD has construed this exemption as encompassing "[i]ncome from vending machines operated by or for the military exchanges or ships' stores system." 32 C.F.R. 260.3(i)(3)(i).

2. Petitioner is the agency designated by the Department of Education to implement the Randolph-Sheppard Act in Oklahoma. In 1978, petitioner requested DOD to distribute to it income from vending machines located on the four military bases in Oklahoma. When DOD declined to make any income-sharing payments to petitioner from vending machine income of service exchanges, petitioner filed this suit in the United States District Court for the Western District of Oklahoma, asserting that DOD's refusal to pay was in violation of the Randolph-Sheppard Act.

The district court entered summary judgment for the government (Pet. App. 18a-31a). The court concluded that although the language of 20 U.S.C. 107d-3(d) seemed to support petitioner's claim to all income from vending machines not located within a retail outlet, the legislative history of the military exchange exemption compelled the conclusion that Congress did not intend to require DOD to

share any receipts from vending machines wherever located, so long as they were operated by military post exchanges (Pet. App. 25a-31a).

The court of appeals affirmed (Pet. App. 2a-13a). Like the district court, the court of appeals held that the plainly stated purpose of the statute was to exempt all vending machine sales by post exchanges from the general requirement of income sharing with state agencies (*id.* at 9a-13a).

3. Petitioner's sole contention (Pet. 6-12) is that the courts below erred in interpreting 20 U.S.C. 107d-3(d) as exempting from the general income sharing provision not only income from vending machines actually located inside of an exchange store, but all vending machine income. Both courts, however, properly rejected petitioner's literal reading of the Randolph-Sheppard Act, which is inconsistent with the unambiguous intent of Congress in adopting 20 U.S.C. 107d-3(d). Compare *Trans-Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978).

The legislative history convincingly supports the court of appeals' holding. The income sharing requirements were added to the Randolph-Sheppard Act in 1974 to remedy the *unauthorized* retention of vending machine income by unofficial employee associations. The Comptroller General's reports to Congress, which described the general problem of money from vending machines in federal buildings being diverted from the treasury, consistently distinguished the *authorized* activities of the official military exchanges (Pet. App. 25a-27a). Congress in 1974 decided to use the money from vending machines in federal buildings to assist state agencies, but maintained the distinction drawn by the Comptroller and exempted income from military exchanges. As the Senate Report explained (S. Rep. 93-937, 93d Cong., 2d Sess. 24 (1974)):

> Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded. [2]

Any doubt on the issue of Congress's intent regarding the scope of the military exchange exemption was laid to rest in the Brademas-Sikes colloquy, relied upon by the courts below (Pet. App. 10a-13a, 28a-30a), which explicitly states that the exemption covered all machines operated by a military exchange. Representative Brademas was the floor manager of the 1974 amendments in the House. During the debates, Representative Sikes sought clarification regarding the exemption for military exchanges. Representative Sikes asked (120 Cong. Rec. 35712 (1974)):

> I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.
>
> * * * * *
>
> Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the

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[2]Petitioner seeks to distinguish the statement in the Report by arguing (Pet. 10) that the exchanges do not operate under "specific statutory authority." Although not created by statute, the exchanges do derive authority from statutes charging the service secretaries with responsibility for the welfare and effectiveness of the military. 10 U.S.C. 3012, 5031, 8012. See generally *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

> language on page 24 of the Senate report (S. Rept. No. 93-937) which is more specific on this issue than is the conference report?

Representative Brademas's response is devoid of any ambiguity: "I am pleased to tell the gentleman that the answer to both his questions is 'Yes.' " 120 Cong. Rec. 35712 (1974).[3]

Finally, petitioner's interpretation of the statute would lead to results that are completely contrary to the purpose of the exemption. As Representative Sikes explained, the profits from the vending machines are used by the military to finance various recreational activities for servicemen. If those revenues were shared with the states, the exchange's programs either would be terminated or would have to be funded through DOD appropriations; neither of these options was deemed acceptable by Representative Sikes. 120 Cong. Rec. 35712 (1974). Under petitioner's interpretation, virtually all of the revenue from these vending machines would be shared with state agencies (Pet. App. 10a), thereby eliminating the revenues Congress intended to go to the military exchanges when it adopted 20 U.S.C. 107d-3(d).[4] The court of appeals was thus clearly correct in

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[3]Petitioner argues (Pet. 9-10) that the Brademas-Sikes colloquy deserves little weight because, at one point in the exchange, the exemption was construed more broadly than it is by DOD. The portion of the colloquy upon which the government relies, however, deals explicitly with the issue in this case and is consistent with the policy articulated elsewhere in the legislative history.

[4]Petitioner points out (Pet. 7) that the Department of Education's regulation (34 C.F.R. 395.32(i)) under 20 U.S.C. 107d-3(d) is narrower than DOD's. The conflict does not warrant review by this Court; the inter-agency legal dispute was submitted to the Department of Justice, which resolved it in favor of DOD's interpretation. Despite petitioner's objection, the court of appeals correctly observed that the role played by the Department of Justice was a neutral one (Pet. App. 13a), and therefore the court properly attached some weight to its nonadversarial, administrative interpretation of 20 U.S.C. 107d-3(d).

holding that the reference in 20 U.S.C. 107d-3(d) to "retail sales outlets" should not be interpreted to defeat the obvious intent of Congress in adopting the 1974 amendments.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

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